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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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Petition of WorldCom, Inc. )  
Pursuant to Section 252(e)(5) of the )  
Communications Act for Expedited )  
Preemption of the Jurisdiction of the )  
Virginia State Corporation Commission )  
Regarding Interconnection Disputes )  
With Verizon Virginia, Inc. and for )  
Expeditious Arbitration )

CC Docket No. 00-218

**RESPONSE OF  
COX COMMUNICATIONS, INC.  
TO THE OPPOSITION OF VERIZON-VIRGINIA, INC.**

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November 20, 2000

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## SUMMARY

Cox opposes that portion of the Opposition filed on November 13, 2000, by Verizon Virginia, Inc. (“VZ-VA”) advocating certain procedures that the FCC should adopt to govern its arbitration of interconnection agreements. VZ-VA believes that amicus briefs should not be either solicited or allowed by the FCC in such proceedings. VZ-VA also requests that the FCC appoint a commercial arbitrator to conduct such proceedings pursuant to the guidelines of the American Arbitration Association (“AAA”), using standard business arbitration practice.

Cox urges the FCC to accept and consider amicus briefs filed by parties other than the petitioner and the respondent in interconnection arbitrations. Such pleadings could bring to the FCC’s attention important public policy issues not raised by the petitioner and the respondent. The FCC’s decision in each arbitration will have a far-ranging impact on the interpretation and implementation of interconnection agreements across the country. Accordingly, several parties will likely have a sufficient interest in the arbitration’s outcome to support a determination that they are interested parties. However, the FCC has not been overwhelmed with comments from interested parties in this proceeding, and there is no reason to believe that a large or unmanageable number of interested parties will participate in each arbitration.

The FCC lacks the legal authority to delegate its responsibilities under the Act to carry out the duties assigned to it in the case of a state’s failure to act. The Act does not grant the Commission authority to transfer its obligations to the AAA, or to any other person or group outside the agency. Rather, the Act clearly directs the FCC to take various steps to ensure that the resolution of an interconnection dispute conforms to its requirements. Cox urges the FCC not to attempt to delegate these duties to third-party, independent arbitrators.

Moreover, because national telecommunication policy will be established every time the FCC rules on an interconnection dispute, the rights of parties other than the petitioner and respondent undoubtedly will be impacted by its decisions. These arbitrations thus differ radically from the disputes that commercial arbitrators are accustomed to handling. The arbitrations also are not disagreements between contracting parties of equal strength over the interpretation of existing contracts. Rather, the balance of power favors the incumbent companies in both negotiating and arbitrating interconnection agreements, and the FCC's direct involvement is necessary to assure fairness to the new entrants.

The AAA's rules and standard practices also are ill-suited to govern the arbitration of interconnection disputes. Cox believes that commercial arbitrators lack sufficient understanding of the complexity of the issues and the highly-specialized knowledge needed to arbitrate interconnection disagreements. Finally, Cox's experience in Nebraska with a commercial arbitrator demonstrates that no savings of time or expense would be achieved by the FCC's reliance on such arbitrators. The Nebraska Commission was forced to modify the arbitrator's proposed findings in Cox's case there, leading to delay and unnecessary cost. For these reasons, Cox agrees with the suggestion to form a three-member panel of arbitrators made up of FCC staff members from three FCC offices.

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COX COMMUNICATIONS, INC.  
TO THE OPPOSITION OF VERIZON-VIRGINIA, INC.**

Cox Communications, Inc. ("Cox") submits this Response to the Opposition of Verizon-Virginia, Inc. ("VZ-VA's Opposition") in the above-referenced proceeding in accordance with the Public Notice, DA 00-2432, released October 27, 2000. This Public Notice sought comment from interested parties on the petition ("the Petition") filed on October 26, 2000, by WorldCom, Inc. ("WCOM") seeking the Federal Communications Commission's ("FCC's") preemption of the jurisdiction of the Virginia State Corporation Commission ("the VSCC").

**I. SCOPE OF THIS RESPONSE**

The Petition was filed pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 47 USC § 151 *et seq.* ("the Act"), and Section 51.803 of the FCC's Rules, 47 CFR §

51.803. WCOM seeks FCC preemption for the purpose of arbitrating an interconnection agreement with Verizon Virginia, Inc. (“VZ-VA”). On November 13, 2000, VZ-VA filed its Opposition to WCOM’s Petition. VZ-VA devoted the bulk of its Opposition to its argument that this proceeding should be dismissed, alleging that WCOM “failed to comply with its statutory obligation to negotiate in good faith” before requesting arbitration from the VSCC.<sup>1</sup> Cox offers no response on this issue. However, Cox notes that VZ-VA did not contest that the VSCC’s express refusal to arbitrate the dispute between WCOM and VZ-VA under federal law constituted a failure by the VSCC “to act to carry out its responsibility” under Section 252 of the Act, 47 U.S.C. § 252. Only a few pages of VZ-VA’s Objection are directed to the procedure that the FCC should adopt in arbitrating the dispute between VZ-VA and WCOM if this proceeding is not dismissed, and Cox responds to those comments.<sup>2</sup>

## **II. SPECIFIC RESPONSES AS TO PROCEDURE**

In its Opposition, VZ-VA makes two comments on procedure. First, it argues that “amicus briefs should not be solicited or allowed.”<sup>3</sup> Second, it argues that the FCC “should appoint a commercial arbitrator under the auspices of the American Arbitration Association” (the “AAA”) who would conduct the arbitration using “standard business arbitration practices.”<sup>4</sup> Cox, as an interested party to this proceeding, opposes these suggestions.

### **A. Amicus Briefs.**

VZ-VA’s objection to the FCC’s receiving amicus briefs is based on its notion that providers “with no vested interest” would submit such briefs, thus causing the parties to expend

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<sup>1</sup> VZ-VA’s Opposition, at 8.

<sup>2</sup> *Id.*, at 15-17.

<sup>3</sup> *Id.*, at 15.

<sup>4</sup> *Id.*, at 17.

“considerable amounts of time and energy reviewing and responding” to them.<sup>5</sup> However, Cox believes that amicus briefs from third parties other than the petitioner and the respondent should be accepted and considered by the FCC, as provided in its rules.<sup>6</sup> Cox agrees with the FCC’s observation that allowing amicus briefs “may, in some instances, allow interested parties to identify important public policy issues not raised by the parties to an arbitration.”<sup>7</sup> The far-reaching impact of an FCC decision on state arbitrations of interconnection agreements throughout the country is alone a reason why this arbitration should be open to amicus briefs—to do otherwise unnecessarily isolates this case. VZ-VA’s concern about hearing from those who do not have an interest in the issues being decided should be alleviated by the FCC’s recognition that such briefs would come from “interested parties.” Nor is there reason to think that amicus briefs would flood the arbitrations; in response to the FCC’s public invitation for “[i]nterested parties” to submit comments or oppositions in this proceeding, it heard from only three (3): Cox, VZ-VA and AT&T.

**B. The Arbitrator and “Standard Business Arbitration Practices.”**

VZ-VA has requested the FCC to assign a commercial arbitrator “under the auspices” of the AAA to conduct the arbitration by using “standard business arbitration practices.” Cox is opposed to both of these ideas.

**1. The FCC Cannot Abdicate Its Responsibilities To A Commercial Arbitrator.**

The power and duty to arbitrate an interconnection agreement lies with the FCC, not a commercial arbitrator “under the auspices” of the AAA. Under the Act, if a State commission

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<sup>5</sup> *Id.*, at 16.

<sup>6</sup> See Section 51.807(g) of the FCC’s Rules, 47 CFR § 51.807(g) (“Participation in the arbitration proceeding will be limited to the requesting telecommunications carrier and the incumbent LEC, except that the Commission will consider requests by third parties to file written pleadings.”).

<sup>7</sup> First Report and Order, 11 FCC Rcd 15499 (1996), ¶ 1295.

fails to carry out its responsibilities under Section 252, the FCC “shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.”<sup>8</sup> Moreover, should a State commission fail to act as described in Section 252(e)(5), “the proceeding by the [Federal Communications] Commission under such paragraph and any judicial review of the Commission’s actions shall be the exclusive remedy for a State commission’s failure to act.”<sup>9</sup> Construing Section 252(e)(5), the FCC has noted that “once the Commission assumes jurisdiction of a proceeding or matter, it retains authority for that proceeding or matter . . . . [O]nce the proceeding is before the Commission, any and all further action regarding that proceeding or matter will be before the Commission.”<sup>10</sup> As a result, nowhere in the Act is the FCC given leave to take a proceeding before it and transfer that matter to the “auspices” of the AAA or any other commercial alternative dispute resolution (“ADR”) entity.

Nor do the FCC’s rules envision the use of a commercial arbitrator. The FCC has stated that in resolving by arbitration any open issues or in imposing conditions upon the parties to an interconnection agreement, the FCC “shall”:

- (1) ensure that such resolution and conditions meet the requirements of section 251 of the Act, including the rules prescribed by the Commission pursuant to that section;
- (2) establish any rates for interconnection, services, or network elements according to section 252(d) of the Act, including the rules prescribed by the Commission pursuant to that section; and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

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<sup>8</sup> 47 U.S.C. § 252(e)(5).

<sup>9</sup> 47 U.S.C. § 252(e)(6).

<sup>10</sup> First Report and Order, ¶ 1289.

47 U.S.C. § 51.807(c). This rule demonstrates that the FCC itself will be involved in the arbitration process, and that it will not simply mail it off to a commercial arbitrator and await his or her reply. In fact, this latter scenario would be inconsistent with the FCC's rule that, "Absent mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties."<sup>11</sup> Unless the FCC were involved with the arbitrator's decision before it became binding on the parties, the FCC could not carry out its responsibilities as set forth in 47 C.F.R. § 51.807(c), quoted above. Thus, the FCC's rules do not provide that matters over which the FCC assumes jurisdiction under Section 252(b)(5) can be farmed out to commercial vendors of ADR.

**2. The FCC Should Not Abdicate Its Responsibilities To A Commercial Arbitrator.**

Even if the option were legally available to the FCC to abdicate its responsibilities to a commercial arbitrator, it should not do so for several reasons.

**(a) Public Policy Reasons Not To Use Commercial Arbitrators.**

National telecommunication policy will be established every time a ruling is rendered in the FCC's arbitration of an interconnection agreement. Thus, the resolution of these disputes will not impact only the rights and obligations of the two parties to the interconnection agreement under arbitration. Rather, the interpretation and implementation of every interconnection agreement in the nation, totaling in the thousands, will be affected by each such ruling. Every party to such an agreement will therefore have a stake in the outcome of each FCC arbitration.

The Act invested the FCC with authority to interpret the intent of Congress in applying the Act to resolve interconnection issues presented to it in cases where the states fail to

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<sup>11</sup> 47 C.F.R. § 51.807(h).

shoulder their responsibility. Such policy-setting authority is too important to be delegated to persons who have been neither elected nor appointed to public office. Decision-making in this area is infused with public policy considerations, and it is impossible to separate legal issues from policy issues. Accordingly, Cox believes that the members and staff of the FCC are the persons who should conduct these arbitration proceedings. Only they possess the knowledge of the relevant law and policy as well as the technical expertise to fulfill these statutorily-imposed duties.

Further, commercial arbitration typically involves two parties to a contract who are more-or-less similarly situated. Both parties have a stake in having a fair interpretation of a contract they have voluntarily entered into. However, in interconnection arbitrations, there is no existing agreement and only one of the parties has a need to obtain the services and facilities under a prospective agreement. The only reason the incumbent local exchange companies (“ILECs”), the players holding all the cards, are at the table at all is due to the compulsion of federal law. This imbalance of power in reaching a fresh agreement—as opposed to a dispute in an existing contract—adds to the reasons why is inappropriate for these proceedings to be conducted by commercial arbitrators.

In addition to the certain delay and the anticipated inferior results of employing a third-party, independent arbitrator, the FCC’s adoption of such a procedure would have an anticompetitive result. New competitive local exchange carriers (“CLECs”) of small or medium size will find the cost and expense of such arbitration to be a barrier to entry. Even large firms relying on a resale strategy or on unbundled network elements obtained from ILECs will be discouraged from competing in the local telephone market by expensive arbitration costs. In addition to the cost of compensating the outside arbitrator, which may be

considerable, it will be least burdensome as a matter of cost if the parties can avoid multiple proceedings. Set out below is a discussion of the lessons learned by Cox in an arbitration proceeding conducted in Nebraska by a third-party, independent arbitrator. Among other things, Cox learned that such a process will not reduce the regulatory body's involvement in the case but may, in fact, enmesh the agency in the morass of "fixing" an arbitrator's proposal resolution. There are internal and external expenses associated with essentially repeating the procedure that should be avoided. Accordingly, the FCC should recognize the anticompetitive impact of burdening new entrants with additional regulatory cost and reject the proposal to delegate its duties to an outside arbitrator.

In its recent Multiple Tenant Environment Order<sup>12</sup> ("MTE Order"), the FCC stated:

We remain committed to removing obstacles to competitive entry into local telecommunications markets by any of the avenues contemplated in the 1996 Act. Nonetheless, we have recognized that the greatest long-term benefits to consumers will arise out of competition by entities using their own facilities. Because facilities-based competitors are less dependent than other new entrants on the incumbents' networks, they have the greatest ability and incentive to offer innovative technologies and service options to consumers. Moreover, facilities-based competition offers the best promise of ultimately creating a comprehensive system of competitive networks, in which today's incumbent LECs no longer will exert bottleneck control over essential inputs, but will compete on a more equal basis with their rivals.

Cox submits that the cost of arbitration by an outside arbitrator will represent an obstacle to competitive entry that should not be erected by the FCC. As a true facilities-based competitor in Virginia, Cox is among a handful of CLECs who are situated to provide residential telecommunication service in competition with VZ-VA. Cox believes that the FCC's goal expressed above will only be realized

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<sup>12</sup> First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, released October 25, 2000, ¶4.

when new entrants are encouraged to invest in facilities rather than being forced to devote their resources to financing additional regulatory proceedings.

**(b) The Arbitration Of An Interconnection Agreement Is Not A Typical Dispute Handled By Commercial Arbitrators.**

Commercial arbitration is designed to settle disputes arising under existing agreements.

The AAA, expressly mentioned by VZ-VA in its Opposition, notes in its publication titled *A Guide to Mediation and Arbitration for Business People*:

In the normal course of day-to-day business affairs, disputes are often inevitable. Parties might disagree as to their individual rights and obligations no matter how carefully a contract is written. . . . Arbitration is referral of a dispute to one or more impartial persons for final and binding determination. Private and confidential, it is designed for quick, practical, and economical settlements.<sup>13</sup>

The fact that commercial arbitration is geared to settling claims based on existing agreements is further revealed in the fee structure generally charged by commercial arbitrators. For example, as set forth in *A Guide to Mediation and Arbitration for Business People*, the AAA's charges are based on the "Amount of Claim," and for "claims" between \$7 million and \$10 million, there is an "Initial Filing Fee" of \$13,000.00 and a "Case Service Fee" of \$3,000.00.<sup>14</sup> By contrast, an arbitration under the Act is not designed to settle a claim under an existing contract. Rather, an arbitration under the Act is designed to create an intricate, technical and lengthy interconnection agreement dealing with matters of public policy consistent with the Act and the FCC's rules. Because matters of public policy are involved, arbitrations under the Act should not be "private and confidential" as the AAA advertises that its services are. In fact, the use of private arbitrators and the prohibition against amicus briefs – both of which

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<sup>13</sup> See, <http://www.adr.org/>

<sup>14</sup> *Id.* These fees are in addition to the fee that the parties would have to pay to the arbitrator. *Id.* As noted above, the cost of commercial arbitration would be yet another barrier to entry for CLECs in their struggle to compete with ILECs to provide consumers with innovative technologies and service options.

VZ-VA champions – would result in a cone of silence being lowered around an arbitration. Non-participating CLECs would be deprived of an opportunity to monitor and comment on disputed issues, even if those same disputed issues are to be decided in their own arbitrations with the same ILEC. This situation also would be a breeding ground for inconsistent results from the individual arbitrators.

**(c) VZ-VA Does Not Define “Standard Business Arbitration Practices” And AAA Rules Would Be Ill-suited For Arbitrating Interconnection Agreements.**

As to the standard business arbitration practices, it is not clear to which practices VZ-VA refers. It has mentioned arbitration under the auspices of the AAA. However, a visit to the AAA’s Web Site failed to locate a “standard business arbitration practice.”<sup>15</sup> Rather, the AAA has eight categories of “Rules/Procedures,” and under just one of these eight categories – “Commercial” – there are approximately twenty-three (23) sets of rules listed beneath the heading of “General Business.” In addition, some of these sets of rules could result in the imposition of procedures inconsistent with the Act. For example, in its Wireless Industry Arbitration Rules, the AAA includes a “Large/Complex Case Track” that has “mandatory pre-arbitration mediation and/or early neutral evaluation;” however, the Act provides for no such mediation or evaluation.<sup>16</sup> Indeed, VZ-VA’s request that only one arbitrator preside would be contrary to this portion of the AAA’s rules, which has a “presumption of multiple arbitrators.”<sup>17</sup>

**(d) The Qualifications Of A Commercial Arbitrator**

As VZ-VA has recognized, interconnection agreements can be “exceedingly complex.”<sup>18</sup> An arbitrator must have an understanding of such complexity and have a highly

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<sup>15</sup> See, <http://www.adr.org/>

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> VZ-VA’s Opposition, at 9.

specialized knowledge of the negotiation process mandated by the Act. A commercial arbitrator with such attributes – other than one affiliated or aligned with an ILEC or a CLEC – may be difficult to identify. Even if one could be identified, it probably would be impossible to conduct an arbitration with a commercial arbitrator within the time frames suggested by WCOM and Cox.<sup>19</sup> In addition, as alluded to above, the cost of a multi-day arbitration with a commercial arbitrator could be significant.

**(e) Cox's Experience With A Commercial Arbitrator In Nebraska.**

Another reason that Cox opposes the FCC's appointment of a third-party, commercial arbitrator from outside the agency is its own experience with such an effort in Nebraska. On January 10, 1997, Cox filed a petition for arbitration<sup>20</sup> by the Nebraska Public Service Commission ("Nebraska Commission") following the failure of negotiations with US West Communications, Inc. to produce an interconnection agreement acceptable to both parties. The Nebraska Commission had adopted a list of candidates to serve as arbitrators in such matters, and the parties together selected one ("Arbitrator") from that list. Following a hearing, the Arbitrator rendered a decision ("Arbitrator's Decision") dated May 1, 1997.

A hearing was then held by the Nebraska Commission in July to determine whether to approve the first revised interconnection agreement that had been submitted by the parties in accordance with the Arbitrator's Decision. On July 15<sup>th</sup>, the Nebraska Commission ordered ("Nebraska Commission Order") major modifications to the agreement that had already been amended once to comply with the Arbitrator's Decision. Out of a total of 14 issues remaining unresolved when the Nebraska Commission conducted its hearing, only 4 of the Arbitrator's

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<sup>19</sup> See Petition of WorldCom, Inc., at 11-12; Comments of Cox Communications, Inc., at 8-9.

<sup>20</sup> Application No. C-1473.

proposed resolutions were approved. The remaining 10 issues, representing more than 70%, were modified by the Nebraska Commission.

The Arbitrator's Decision failed to furnish detailed rationale for the Arbitrator's conclusions. It consists of a recitation of each party's proposed language to resolve each issue, followed first by a ruling in favor of one of the parties and then only a rudimentary discussion of the reasoning supporting the ruling. As an example, the discussion of a resolution in favor of US West on a collocation issue (Issue No. 3) consists entirely of the following: "The additional language proposed by Cox is too general and vague and likely would lead to future disputes." The Nebraska Commission reversed this ruling, finding that the language proposed by US West was "contrary to the Act."<sup>21</sup> Similarly, in discussing a ruling for US West on a Cox tandem switch issue (Issue No. 19), the Arbitrator's Decision states: "Cox's position is nonmeritorious. Cox's switch is not factually equivalent to U S WEST's tandem switch." Although the Nebraska Commission upheld the ruling in favor of US West, it was compelled to furnish more explanation, based upon an earlier decision, supporting this factual conclusion.<sup>22</sup>

Cox believes that the Arbitrator may have lacked technical expertise about the telecommunications industry and that this deficiency unnecessarily prolonged the proceeding and led to proposed conclusions that the Nebraska Commission did not accept. Moreover, in Cox's opinion, the Arbitrator may have lacked knowledge of the legal and policy nuances that are implicated in attempting to resolve interconnection issues. The Act is a watershed in the history of the regulation of telecommunications. After Congress set in motion this sea change, regulators had to confront the burden of moving the local telephone industry from a monopoly to a competitive environment. It is understandable that a single arbitrator would lack the depth

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<sup>21</sup> Nebraska Commission Order, p. 3.

<sup>22</sup> Nebraska Commission Order, pp. 6 & 7.

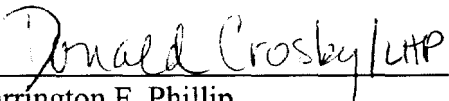
of knowledge to determine which competing party's position is correct on each of several complex issues. The Nebraska Commission's order overturned many of the Arbitrator's proposed resolutions. Cox has no reason to expect a different result today than it received in 1997.

### III. CONCLUSION

Cox believes that the arbitration proceedings described in its earlier comments, with the consideration of amicus briefs and conducted by the FCC pursuant to its own rules and procedure, would protect each party's right to a fair and impartial decision on all issues.

Respectfully submitted,

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November 20, 2000

## CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a secretary for Dow, Lohnes & Albertson, PLLC, do hereby certify that a copy of the foregoing **"RESPONSE OF COX COMMUNICATIONS, INC. TO THE OPPOSITION OF VERIZON-VIRGINIA, INC.,"** was sent by hand delivery this 20th day of November 2000, or via U.S. mail where indicated, to the following:

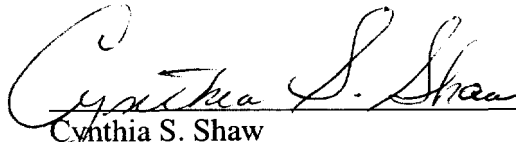
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